Employers must start redundancy consultation at the formative stage of the process and before dismissal becomes a foregone conclusion

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In Mogane v Bradford Teaching Hospitals NHS Foundation Trust and anor the EAT held that redundancy consultation must commence at the formative stage of the process in order to be meaningful. Using an arbitrary selection criterion to place an employee into a redundancy pool of one was unfair and also meant that consultation about the dismissal was futile.

What happened in this case?

The Claimant was one of two “Band 6” nurses. Both nurses were employed on fixed-term contracts. The Claimant had been employed for several years on a series of one-year fixed-term contracts. The second nurse was near to the beginning of a two-year fixed term contract, having recently joined and completed her probationary period. Out of the two nurses, the Claimant’s fixed-term contract was due to expire first.

Financial pressures meant that the employer needed to reduce the number of Band 6 nurses. Instead of placing both Band 6 nurses into a redundancy pool and using criteria to select one of them for redundancy, the employer decided that the person whose contract was due to expire first would be selected for redundancy – this was the Claimant. The employer made this decision sometime between 21 March 2019 and 8 May 2019.

A consultation meeting was held on 12 June 2019, by which stage the decision had already been taken that the Claimant would be made redundant. The only outstanding issue was whether suitable alternative employment could be found for her. The remainder of the consultation process was focused on

that issue. No alternative role was found, and the Claimant was dismissed as redundant on 31 December 2019.

An Employment Tribunal rejected the Claimant's claim that she had been unfairly dismissed. She appealed to the EAT. She argued that her dismissal was unfair because the employer:

- failed to consult with her about the proposal to place in her in a pool of one;
- gave no consideration to whether the second nurse should have been included in the pool as well;
- used a criterion to select her for redundancy which was arbitrary and unfair (i.e. which fixed term contract was due to expire first). She argued that it amounted to "a game of musical chairs" which the employer could exploit by deciding when to turn off the music; and
- used a single criterion to select her for redundancy and this was outside of the band of reasonable responses.

She also argued that the Tribunal had failed to provide any reasons for its conclusion that the employer's pooling decision was reasonable

What was decided?

Importantly, the EAT said that the employer started the consultation process too late. Consultation should take place at the formative stage of a redundancy process. This permits meaningful consultation, since the employee can make representations which have the potential to affect the outcome. This is the approach taken in collective redundancy consultations and the EAT said that "with appropriate adaptations" this should be applied to individual consultations.

When it came to the pooling decision, the EAT noted that a Tribunal should not easily interfere with an employer's choice of pool. However, it must consider whether there is a rational explanation for the pool. The EAT pointed out that

the duty of trust and confidence means that employers must not act arbitrarily between employees. This impacts on decisions concerning redundancy pooling.

Once the employer decided that the expiry of the fixed-term contract was to be the only criterion, it was a foregone conclusion that the Claimant would be dismissed, meaning that consultation on the dismissal was futile.

The EAT also agreed that the Tribunal's judgment did not explain why it was reasonable to have used this sole section criterion without prior consultation. The EAT allowed the appeal and held that the dismissal was unfair.

What are the learning points for employers?

The key takeaway from this case is that employers should ensure that individual as well as collective consultation about proposed redundancies begins early enough in the process to allow meaningful consultation. In this case, once the selection criterion had been decided upon, it was inevitable that the Claimant would be dismissed (unless an alternative role were found). Therefore, consultation about the redundancy was meaningless. Had the employer begun the consultation before the pooling decision had been made, the Claimant could have made the case for using additional criteria, which may have led to a pool of two.

Employers must also take care with the criteria used for selecting candidates for redundancy, ensuring that they do not result in arbitrary outcomes. Obtaining agreement on the proposed criteria during the early stages of the consultation is a sensible step to take and should help to avoid attempts to unpick the redundancy pooling decision later on in the process. Further, where there are two or more employees in comparable roles, placing only one of them into a redundancy pool will not usually be fair without prior consultation.

Mogane v Bradford Teaching Hospitals NHS Foundation Trust and

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